No. 15,583

United States Court of Appeals

For the Ninth Circuit

ALEX E. WILSON,

Appellant,

vs.

FRED G. STEVENOT, Trustee of Coastal Plywood & Timber Co., debtor,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Appeal from the United States District Court for the Northern District of California, Northern Division.

STATEMENT OF JURISDICTION.

This is an appeal from a judgment of the District, Court, Northern District of California, Northern Division, rendered in a reorganization proceeding in which the Court refused to award to Appellant reasonable compensation for services rendered to the Debtor corporation, Coastal Plywood & Timber Co., while said Debtor corporation was in the midst of proceedings for the reorganization of a corporation under Chapter 10 of the Bankruptcy Act (U.S.C. Title XI, ch. 10, Sections 501 to 676). Appellant petitioned for compensation under Sections 241-250 of

the Bankruptcy Act (11 U.S.C. Sections 641-650) providing for compensation and allowance for services rendered to the Debtor estate in reorganization proceedings.

This appeal is taken under Section 250 of the Bankruptcy Act (11 U.S.C. Section 650) after the denial of Appellant's claim, and also under the provision of Section 23 and Section 25 of the Bankruptcy Act (11 U.S.C. Section 47 and Section 48), which gives the United States Court of Appeals appellate jurisdiction from the several Courts of Bankruptcy in their respective jurisdictions.

STATEMENT OF THE CASE.

The Appellant, Mr. Alex E. Wilson, filed his Petition for Allowance of Real Estate Broker's Commission with the District Court petitioning the Court for reasonable compensation for services rendered to the Trustee, and to Coastal Plywood & Timber Co., the Debtor corporation, in the sale of the assets of the Debtor corporation. (Tr. 19-31.) It is his contention that these services were rendered at the request of the Trustee and his attorney, and that these services were of great benefit to the trust estate. His petition was based on Sections 241-250 of the National Bankruptcy Act (11 U.S.C. Sections 641-650) which authorize an allowance of reasonable compensation for services rendered in connection with the administration of an estate in a proceeding under Chapter 10 of the Bankruptcy Act.

The evidence on the hearing of this petition established that Coastal Plywood & Timber Co., was a corporation with extensive timber holdings in Northern California, and that it had petitioned for reorganization of its affairs under Chapter 10 of the Bankruptcy Act. Mr. Fred Stevenot was appointed as Trustee for the Debtor corporation, and Mr. Sterling Carr was appointed as one of the attorneys for the Trustee. Mr. Alex E. Wilson was and now is a duly licensed real estate broker specializing in the sale of timber holdings. (Tr. 132-133.)

In approximately July, 1952, Mr. Sterling Carr, one of the attorneys for the Trustee, asked Mr. Wilson if he would help to sell the assets of Coastal Plywood & Timber Co. (Tr. 135.) Mr. Wilson subsequently discussed the sale of these assets with Mr. Stevenot, the Trustee, and was authorized to proceed with the sale of certain timber cutting contracts referred to as the Ricard, the Brush and the Reynold contracts (Tr. 135-136), and was authorized to proceed with the sale of certain timber rights referred to as the Garcia Tract. (Tr. 140-141.)

Following these conversations Mr. Wilson expended a great deal of time, effort and money in attempting to find purchasers for these timber cutting contracts and for the timber rights in the Garcia Tract. (Tr. 137-141.) During this time Mr. Wilson was continually in contact with the Trustee, Mr. Stevenot, by personal visits in his office, by telephone, and by letter, keeping him advised of the status of his negotiations,

the people he had called on, and the people he hoped to interest in the purchase of these assets. (Tr. 142.)

Finally, in October, 1952, Mr. Wilson submitted to Coastal Plywood & Timber Co., an offer from Mr. Clarence Nielson for the purchase of the said timber cutting contracts for the sum of $100,000.00. (Petitioner's Exhibit No. 1, Tr. 145-146.) This offer on behalf of Mr. Nielson in the sum of $100,000.00 was accepted by the Trustee, submitted to the Court, and approved by the Court. (Tr. 3-18.) In connection with the approval of this sale of these cutting contracts the Court authorized the payment of a real estate broker's commission to Mr. Wilson in the sum of $5,000.00, which is a normal real estate broker's commission of 5% on the total purchase price. The order of the Court, dated November 12, 1952, authorizing payment of the said real estate commission reads as follows:

> "That Fred G. Stevenot, as Trustee herein, be, and he is hereby authorized to pay to A.W. Wilson, from said sum of 100,000.00 a commission on said transaction in the amount of $5,000.00." (Tr. 18.)

This real estate commission was paid to Mr. Wilson by Coastal Plywood & Timber Co., check in the sum of $5,000.00. The stub of this check was introduced as Petitioner's Exhibit No. 2 and reads as follows: "Commission—sale of cutting contracts—$5,000.00". (Tr. 147.)

Following the sale of these timber cutting contracts to Clarence Nielson, Appellant continued in his efforts

to sell the Garcia Tract again expending a great deal of his time, effort and money and further continued in his practice of keeping Mr. Stevenot informed of his progress by personal visits, telephone and letter. Mr. Stevenot cooperated in every way by supplying Mr. Wilson with their timber cruisers and maps of the property (Tr. 270), and by giving him permission to show the property to prospective purchasers (Tr. 315) and by encouraging him in his efforts to sell this timber.

There is evidence that during the course of the negotiations for the sale of both the timber cutting contracts to Clarence Nielson and the Garcia Tract that the Trustee advised Appellant that he should obtain his compensation from the Buyer, and that the estate would not be responsible for his commission. Appellant admits that conversations were held with the Trustee wherein he was advised that he should look to the buyer for his commission, but Appellant testified that he stated to Trustee that this was impossible; that the seller always paid the real estate commission and not the buyer; and that Appellant didn't think it was possible to get his commission from the buyer, but that he would try to do so. There was never any agreement between Appellant and the Trustee that Appellant would look only to the buyer for his commission. At page 137 of the Transcript the following testimony appears:

"Q. What did you reply to that?

A. (Wilson.) Oh, I told Mr. Stevenot then, as I have told him many times, I said, 'Well, that

is a very difficult thing to do; the buyer never pays, the seller always pays. I will try to do it, but I don't think I can'.

Q. Did you ever agree with Mr. Stevenot in regard to these contracts that we are now discussing that you would obtain your commission from the buyer.

A. No, never; it was always a question of him saying, to try and get it from the buyer and my saying, 'Mr. Stevenot, I can't get it from the buyer.' "

In spite of the conversations in regard to compensation the Trustee continued to urge Appellant to sell these assets. At page 273 of the Transcript the following testimony appears.

"Q. Did Mr. Stevenot ever tell you not to proceed if you could not get your brokerage from the buyer?

A. (Wilson.) No, quite the contrary; he urged me at all times to sell it, to continue to attempt to."

Appellant was paid his real estate broker's commission by the Trustee and the Debtor estate when he sold the timber cutting contracts to Clarence Nielson, and Appellant reasonably believed that he would be paid his commission by the Trustee in this matter if he was successful in selling these assets. The following testimony appears at page 272 of the transcript.

"A. (Wilson.) These conversations would take place in his office, Mr. Stevenot would tell me that he didn't want to pay me and he would say, 'Alec, I want you to get your commisison from the buyer.'

I would retaliate saying, 'Mr. Stevenot, you can't do that. In my 33 years as a broker I have never received a commission in my life from a buyer.' Mr. Stevenot would follow the same pattern in the next meeting, always stated he wanted me to get the commission from the buyer.

I asked him one day, I said, 'Mr. Stevenot, why do you take that particular position? You know that that is an impossible thing to do.'

He said, 'Well, I have a lot of fees to pay, I have got my own fee, and the attorney's, and I *just want* to go before the Court and ask for additional fees.'

Q. Mr. Wilson, during these discussions did you ever reach a definite understanding with Mr. Stevenot that you would not obtain your commission from Coastal?

A. Never a definite understanding, no, until the 22nd day of July and then I had a definite understanding.

Q. Did you ever have a definite understanding with him that you would obtain your commission from the buyer?

A. No, and I believed that he would pay me, because he followed the same pattern when I sold the Nielson deal, he always told me he wouldn't pay me, but he did pay me in the final analysis''

. . .

During the course of these negotiations Appellant, Alex E. Wilson, discussed the sale of these assets at various times with Mr. Sterling Carr, one of the attorneys for the Trustee. In the course of these conversations Appellant was assured by Mr. Carr that he would be paid for his services if he was successful in

selling these assets of Coastal Plywood, and Mr. Carr encouraged him to continue his efforts to sell these assets with the assurance that in the final analysis he would be paid by the Trustee for his services. At page 273 of the Transcript the following testimony appears:

> (Wilson.) ". . . I also told Mr. Carr, I would report to Mr. Carr and I would tell him that Mr. Stevenot told me that he wouldn't pay me. Mr. Carr would urge me to continue. He said 'Stevenot is quite a decent fellow, he won't do that in the final analysis. He is not going to cheat you out of your brokerage if you sell it. Stevenot is all right, he is a good businessman *and he will pay you.*' " (Emphasis added.)

Again at pages 306-307 of the Transcript appears testimony of the Appellant under cross-examination concerning his conversations with the attorney for the Trustee:

> "Q. Do you deny that the Trustee told you that if you worked on any proposal that you must act for the proponent, get your compensation from the proponent? (209.)
>
> A. (Wilson.) Oh, Mr. Stevenot told me that all the time. He told me that with the Nielson deal, he never wanted to pay me—he said, 'I don't want to pay you, I don't want to go before the Court.' Mr. Carr, of course told me all the time, 'You don't have to pay any attention to that because after all he has no authority to pay you, he hasn't any authority to give you a contract.' He says, 'We want to sell it and he wants to sell it, and I am going to see that the stockholders get dollar for dollar, and you will have to bring in—Alex, you will have to bring in an offer where the

> stockholders are going to be protected, that is what I am mostly interested in, and everyone else, and then we can sell it.' But he said, 'If Mr. Stevenot takes this position that he won't pay you, then you must appeal to the Court. That is your refuge, and you will be treated honestly if you complete the deal and save this institution.' "

It is important to note that this testimony in regard to conversations with Mr. Carr stands uncontradicted in the record. Although Mr. Carr was one of the attorneys for the Trustee, he was not called to refute any of this testimony.

At various times Mr. Stevenot discussed with Appellant the terms of the sale which he wished to obtain for the assets of Coastal Plywood. These assets consisted of a sawmill, a log deck, rolling stock, 585,000,000 feet of timber and 36,000 acres of land. (Tr. 250.) Appellant suggested that he could probably obtain more money for the stockholders if he sold these assets piecemeal, but Mr. Stevenot insisted that all of these assets be sold in one sale. (Tr. 252.) Mr. Stevenot also insisted that the purchaser have sufficient cash to pay off all administration expense and the secured creditors, and suggested that an offer of $4,000,000.00 with substantial people would probably be approved. (Tr. 253-254.)

Appellant continued in his efforts to find a purchaser for these assets (Tr. 255-260), and estimates that his actual time and expense in this regard were worth approximately $20,000.00. (Tr. 261.) He continued to keep the trustee informed of his activities

and efforts by personal conversation, telephone calls and letters, and the Trustee was fully aware that Appellant was going to a great deal of expense and effort to obtain a purchaser for these assets. (Tr. 262-270.)

Finally, in April, 1953, Appellant began negotiations with the Sugarman interests through Mr. William Steinberg, an attorney in San Francisco. (Tr. 275-276.) The Sugarman interests insisted that before they could offer to purchase all of these assets of Coastal Plywood in one purchase as the Trustee required, it would be necessary to make some provision for the resale of these assets to other parties. (Tr. 278-279.) Appellant was able to arrange for these resales, and as a result on July 22, 1953, a written offer was delivered to the Trustee on behalf of the Sugarman interests for the purchase of the assets of Coastal Plywood. (Petitioner's Exhibit No. 3, Tr. 157-159.) The sale of these assets was eventually consummated to Sugarman Lumber Co., a corporation formed by the Sugarman interests to take over these assets. (Tr. 176-177.) The final gross sale price was $4,352,000.00. (Tr. 386.) Appellant was excluded from the final negotiations between the Trustee and the Sugarman interests which resulted in this sale, and was never informed as to when the meetings between these parties were to take place. (Tr. 320, 407.) No provision was made in these negotiations between the Trustee and the Sugarman interests for the payment of any compensation to Appellant.

There is no question but that Appellant introduced the Sugarman interests to the Trustee, and that he

was the procuring cause of the sale. This was admitted by the Trustee from the witness stand, this testimony appearing at page 319 of the Transcript.

> "Q. Mr. Hildebrand. But Mr. Wilson and Mr. Steinberg were the people who brought Sugarman to you, weren't they?
>
> A. Mr. Stevenot. I am telling you, I don't deny that."

The testimony discloses and the Trustee has stipulated, that this sale procured by Mr. Wilson was most beneficial to the Debtor estate. This stipulation appears at page 388 of the Transcript:

> "Mr. Olson. I will stipulate, your Honor, that the second plan of reorganization which encompassed this sale was most beneficial to the estate."

It is apparent from the testimony that this sale for which Appellant was responsible resulted in preventing the Debtor corporation from going into bankruptcy, and resulted in payment of the creditors in full, and in allowing substantial returns to the shareholders. It is equally apparent that if it had not been for the efforts of Appellant the property would have been foreclosed by Bank of America and R.F.C. and that the stockholders and other creditors would have received nothing. (Tr. 271.)

The lower Court was satisfied that Appellant had rendered services with the full knowledge, cooperation and encouragement of the Trustee and his attorney; that the services were accepted by the Trustee, and that the services were of real benefit to the bankrupt

estate. (Tr. 51—Memorandum Opinion.) However, the lower Court felt that Appellant was a volunteer, and that no obligation to pay for these services was created. In addition, the lower Court felt that the warning by the Trustee that the estate would not pay any broker's commission prevented a recovery by Appellant. Finally, the Court said "To torture an agreement to pay a commission out of these facts would be to create an implied contract where none in fact existed. Equity can enforce the contract, whether express or implied, but equity cannot make the contract for the parties where there was in fact no understanding upon which a contract could be founded." (Tr. 54-55.)

In response thereto Appellant's position in summary is that the acceptance by the Trustee of services rendered at his request, which were of great benefit to the bankrupt estate, created an obligation both at law and in equity to pay for these services, and that the Bankruptcy Court should have awarded reasonable compensation to Appellant for these beneficial services to the bankrupt estate under Sections 641-650 of the Bankruptcy Act (11 U.S.C. 241-250), under the applicable cases, and under the general law of implied in fact and quasi contract.

The evidence shows that Appellant always advised the Trustee that he could not obtain his compensation from the buyer, and that irrespective of these statements by the Trustee, that Appellant continued to look to the seller, the bankrupt estate, for his compensation. Furthermore, it is evident that although Appellant

produced the purchaser of the assets he was in effect foreclosed from negotiating a broker's commission from the buyer because the Trustee excluded Appellant from the final sale negotiations and thereby exercised unlawful dominion over the services of the Appellant, and if seller does not pay for the said services it would result in an unjust enrichment of the seller at the expense of Appellant. Appellant further contends that he was justified in so looking to seller for his compensation irrespective of these warnings by the Trustee in view of the statements to Appellant by Sterling Carr, attorney for the Trustee, that Appellant would be paid by the Trustee if he sold these assets, and in view of the fact that Appellant had been paid a real estate broker's commission by the Trustee in the Nielson transaction under identical circumstances and after exactly the same statements by the Trustee that the estate would not be responsible for his compensation. Accordingly, the Trustee and the Debtor estate should be estopped from denying Appellant reasonable compensation.

Appellant further contends that under the law of quasi contract the acceptance of the benefits of Appellant's services by the Trustee knowing that they had been rendered with the expectation of compensation created an obligation to pay for these services irrespective of the intent of the parties and even in the face of an expressed intention not to pay. Finally, it is evident that Appellant was not an officious volunteer because his services were rendered with the full knowledge, cooperation and encouragement of the Trustee

and his attorney, and Appellant, therefore, should not be denied compensation on that ground.

SPECIFICATION OF ERRORS.

The following is a list of the errors which Appellant intends to urge on appeal:

1. That the District Court erred in not finding that Appellant should be allowed a reasonable compensation for his services rendered to the Debtor in this reorganization proceeding at the special instance and request of Trustee, which services were accepted by the Trustee and admittedly of great benefit to the Debtor's estate.

2. That the District Court erred in not finding an implied in fact contract between Appellant and the Trustee of the Debtor's estate to pay Appellant a real estate broker's commission for his services in finding a buyer who purchased the assets of Debtor's estate for the gross sum of approximately Four Million Three Hundred Fifty-two Thousand Dollars ($4,352,000.00) which services were accepted by the Trustee and admittedly of great benefit to the Debtor's estate.

3. That the District Court erred in not finding an implied in law or quasi contract between Appellant and the Trustee of Debtor as a matter of equity to pay the reasonable value of services rendered to Debtor's estate which were accepted

by the Trustee and admittedly of great benefit to Debtor's estate, irrespective of the intent of the Trustee.

4. That the District Court erred in not finding that the District Court sitting in bankruptcy by virtue of its inherent equitable powers and as a matter of sound public policy should award compensation to Appellant for valuable services rendered to, accepted by and of great benefit to Debtor's estate.

5. The District Court erred in not finding an express contract or implied in fact contract between Appellant and Debtor's estate based upon the assurances by Sterling Carr, attorney for the Trustee and agent of Debtor's estate, that Appellant would be paid a real estate broker's commission if he found a purchaser for the assets of Debtor's estate.

6. The District Court erred in not finding that the representations of Sterling Carr, attorney for the Trustee, who assured Appellant that he would be paid if he found a purchaser for the assets of Debtor's estate, were binding on Trustee and on Debtor's estate.

7. That District Court erred in refusing to compensate Appellant as a matter of equity for valuable services rendered to and accepted by Debtor estate, particularly since Appellant was encouraged to proceed and promised compensation therefor by an agent of the Trustee.

8. That District Court erred in finding that Appellant was to obtain his brokerage commission from Buyer for the said sale of the assets of the Debtor's estate, and that he was a volunteer.

9. That District Court erred in not finding that Appellant reasonably relied upon the Nielson transaction, which was a prior sale of similar assets of the same Debtor's estate, under similar circumstances, and for which Appellant was paid a brokerage commission in the sum of Five Thousand ($5,000.00) Dollars by a check of the Debtor's estate; and in not finding that by virtue thereof Appellant proceeded to find a buyer of the remaining assets of Debtor's estate, in good conscience and in good faith, believing he would be similarly compensated.

10. The District Court erred in not estopping Trustee from refusing payment of a brokerage commission to Appellant, in view of the fact that Trustee paid Appellant under similar circumstances in the Nielson transaction, on which Appellant reasonably relied and rendered his services and incurred expense to find the buyer of the said assets and as a result thereof expected compensation therefor.

11. The Trial Court erred in not finding that Petitioner expended a great deal of effort and incurred a great deal of expense in producing a buyer of the Debtor's estate, and that in so doing he acted in good faith and reasonably believed, because of the Nielson transaction and the repre-

sentations of the Trustee and by his attorney and agent, that he would be compensated for his services.

12. That by reason of the law and evidence Appellant is entitled to a Judgment for a real estate broker's commission, or for reasonable compensation for services rendered to Debtor's estate which were of great benefit to Debtor's estate.

13. That the evidence does not support the Findings of Fact and Conclusions of Law made and entered by the District Court.

14. That the Order denying compensation made and entered by the District Court is not supported by the law.

ARGUMENT.

I.

THE CIRCUMSTANCES OF THIS CASE COMPEL THE COURT TO ALLOW COMPENSATION FOR THE SERVICES RENDERED BY APPELLANT AT THE REQUEST OF THE TRUSTEE, ACCEPTED BY THE TRUSTEE, AND OF GREAT BENEFIT TO THE BANKRUPT ESTATE.

The facts of this case show that the Trustee, and his attorney, Sterling Carr, requested that Appellant find a purchaser for the assets of the bankrupt corporation, and that they continually encouraged Appellant in his efforts to secure a purchaser for these assets. (Tr. 270, 273.) After a great deal of work and expense, Appellant procured Sugarman Lum-

ber Company as the purchaser of these assets. (Tr. 319.) The result of his services in procuring said purchaser were freely accepted by the Trustee, and it has been stipulated that these services were of great benefit to the bankrupt estate. (Tr. 297.) The said services were performed with the expectation of compensation, and were not intended to be gratuitous. After the purchaser had been procured by Appellant as requested, the evidence shows that the purchaser was taken by the Trustee without any thought or provision for compensating Appellant. (Tr. 320, 407.) There is no question but that these services rendered at the request of the Trustee and his agent, freely accepted by the Trustee, and of great benefit to the bankrupt estate created an obligation to pay for them which is recognized both at law and in equity and in proceedings under the Bankruptcy Act.

There can be no doubt that a Bankruptcy Court is a Court of equity and has broad equitable power (8 Corpus Juris (2d) 429, Section 21); that these equitable powers apply in the allowance of claims in bankruptcy proceedings in order to see that injustice or unfairness is not done in the administration of the bankrupt estate; (8 Corpus Juris (2d) 430-431, Section 22; *In re Avery,* 114 Fed. (2d) 768; *Interstate National Bank v. Luther,* 221 Fed. (2d) 382; *In re Commonwealth & Power Co.,* 141 Fed. (2d) 734); and that the Bankruptcy Court will look to the substance of the transaction rather than to the form toward the end that fraud will not prevail and that technical consideration will not prevent substantial

justice from being done. (*Pepper v. Litton,* 308 U.S. 294, 60 Sup. Ct. 238; 84 L. Ed. 281.) The rule which clearly is deducible from the authorities is that where a party designated by the act renders service in connection with the proceeding and plan the Court may not, without some special justification, refuse to allow any compensation whatever. (*In re Building Development Co.,* 98 Fed. (2d) 844, 846); that for successful administration of the statutes it is as important that committees who have earned something get some compensation as it is that they should not get too much. (*In re Prudence Co., Inc.,* 93 Fed. (2d) 455, 456) and that a very broad discretion is lodged in the chancellor in the allowance and fixing of fees which discretion must be exercised with judgment and with the double purpose of doing equities to those distressed and at the same time rewarding faithful and necessary service with reasonable compensation. (*In re Herz Inc.,* 81 Fed. (2d) 511, 512.)

Certainly these equitable powers of the Bankruptcy Court should be applied in this case to compensate the Appellant whose services have been of immense benefit to the bankrupt estate. It is submitted that people, such as Appellant, should be encouraged to try to help the bankrupt estate, rather than being discouraged by a refusal of any compensation when their services have been accepted and of benefit to the estate. When a man like Appellant has prevented the assets of this estate from being foreclosed by procuring a sale of those assets for a sum in excess of $4,325,000.00 he should be reasonably compensated if it is at all possi-

ble for him to be compensated. It is apparent from the testimony that if it had not been for the services of Appellant in obtaining a purchaser for the assets of this estate we might well conclude that the Bank of America and R.F.C. would have foreclosed for the amount due, and the stockholders and creditors would have received nothing. (Tr. 403.) As a result of Appellant's efforts a sum in excess of $4,325,000.00 was received on the sale of these assets, and this sum will enable the creditors and stockholders to be paid in full. In fact, everyone including the Trustee has been paid except Appellant who services made all of these other payments possible.

While the lower Court recognized that these services had been rendered with full knowledge, cooperation and encouragement of the Trustee and his attorney, were accepted by the Trustee, and were of great benefit to the bankrupt estate, it felt that conversations between the Trustee and Appellant during the course of their negotiations wherein the Trustee advised Appellant that he should obtain his compensation from his buyer prevented Appellant's recovery or compensation in this matter. However, it is clear that Appellant never agreed that he would obtain his compensation from the buyer. Appellant always protested that he did not think it possible to obtain his compensation from the buyer, and that the seller always paid the commission in a real estate transaction. Appellant always believed that in the final analysis he would be paid by the Trustee if he could not obtain his compensation from the buyer. Ap-

pellant was certainly justified in this belief. The Trustee had made identical statements to him in regard to the Nielson transaction. However, when the buyer would not pay his commission, a commission of 5% of the sale price was paid by the bankrupt estate. Appellant also discussed these conversations with Sterling Carr, attorney for the Trustee, and was advised that in spite of the said statements by the Trustee he would be paid if he sold these assets.

A. The Nielson Transaction.

Appellant was requested by the Trustee and his attorney to obtain a purchaser for certain cutting contracts, but was warned by the Trustee that he should obtain his compensation from the buyer. The situation was identical with the transaction now before this Court. Appellant told the Trustee that he did not believe that he could obtain any compensation from the buyer and that it would be very unusual if he could, but that he would try. Appellant secured Clarence Nielson as the purchaser of these cutting contracts. As Appellant had anticipated, the buyer refused to pay any compensation to Appellant, stating the buyer never paid the commission, and that the commission should be paid by the seller as was the usual situation. There is evidence of a conference between the Trustee and Clarence Nielson wherein the Trustee attempted to get Mr. Nielson to pay the commission, or to increase his offer so that the estate would net $100,000.00 after the payment of a commission to Appellant. Mr. Nielson refused to do either, and refused to pay more than the sum of $100,000.00

for these cutting contracts. In the face of this refusal by Mr. Nielson to pay a commission, the Trustee, knowing that he must pay the broker's commission if he intended to complete this sale to the purchaser procured by Appellant, agreed to pay the commission of Appellant. The Trustee petitioned the Court for the approval of the sale, and for the payment of a commission of $5,000.00 to Appellant. No prior authorization for Appellant's services had been obtained from the Court. There was no contention made in the Nielson transaction that Appellant was a volunteer. The payment of this $5,000.00 commission was approved by the Court and was paid by check of Coastal Plywood & Timber Co., the Debtor corporation, to Appellant.

The conduct of the Trustee in paying a commission to Appellant on the sale of these cutting contracts in the Nielson transaction, in spite of warnings that Appellant should obtain his compensation from the buyer, certainly confirmed Appellant in his belief in this case that if he procured a purchaser who refused to pay the commission the Trustee would pay him before he accepted the benefit of his services. In accord with this belief that he would be paid Appellant proceeded with the sale of the balance of the assets of Debtor which are the subject of this proceeding. As Appellant testified, the Trustee paid him before under identical circumstances, and he thought that he would pay him this time. This feeling was strengthened by the statements of Sterling Carr, the attorney for the Trustee, that if Appellant sold these assets,

he would be paid. It seemed apparent to Appellant in view of the assurances of Sterling Carr and the conduct of the Trustee in the Nielson transaction that, if Appellant was not successful in obtaining his compensation from buyer, then, of course, the Trustee in the final analysis would pay his commission if he wished to accept the benefit of the purchaser produced by Appellant, and if he wished to complete the sale to such purchaser. It was in this belief that he would be paid for his services that Appellant continued his search for a purchaser of these assets and completed this sale.

B. Statements by Sterling Carr That Appellant Would Be Paid.

According to the undisputed evidence in this case, Mr. Sterling Carr, the attorney for the Trustee, on various occasions and over a period of time, encouraged Appellant to find a buyer for the assets of the bankrupt estate, and said attorney told Appellant he would be paid for his services. Mr. Carr was not called by the Trustee to refute any of this evidence in regard to his conversations with Appellant, and the evidence of these conversations is undisputed in the record. These statements were obviously made in an effort to keep Appellant active in his search for a purchaser of these assets. The statements of this attorney for the Trustee on one of these occasions appears at page 273 of the Transcript.

> "(Wilson.) I also told Mr. Carr, I would report to Mr. Carr and I would tell him that Mr. Stevenot told me that he wouldn't pay me. Mr.

> Carr would urge me to continue. He said, 'Stevenot is quite a decent fellow, he won't do that in the final analysis. He is not going to cheat you out of your brokerage if you sell it. Stevenot is all right, he is a good businessman *and he will pay you*' ".

Here is the uncontradicted and unequivocal statement by the attorney and agent of the Trustee to Appellant that he would be paid for his services. This statement alone, without any of the other equitable circumstances of this case, would compel the payment of compensation to Appellant in this matter.

Again at pages 287-288 of the Transcript the following uncontradicted statement by Mr. Sterling Carr appears:

> "(Wilson.) Mr. Carr said, 'I was never so shocked in all my life, I can't believe it, I can't believe that this is true'. He said, 'Alec, you go along just exactly the way you are going, don't say anything about it, because if Mr. Stevenot is going to treat you that way after you have raised all this money and sold this property, then the only thing you can do is seek refuge with the court, because, after all, Mr. Stevenot hasn't got any legal right to give you a contract. Mr. Stevenot hasn't any legal right to set your fee, and you go right along, because you have been honest in this thing and you have worked hard and we needed this money so badly, and when the deal is closed, if he still doesn't pay you and you sue for it you can feel perfectly safe that the Courts of this state will treat you justly' ".

Appellant has now appealed to the equity and justice of this Court for compensation for these services which the agent of the Trustee unequivocally stated would be paid. In all equity and justice, under the circumstances of this case, and to prevent an unjust enrichment at the expense of Appellant, he should be paid the reasonable value of the said services. It is apparent that Appellant was misled throughout this transaction by the conduct of the Trustee and the statement by his agent that he would be paid for his services. Appellant performed these services in the justifiable belief and with the reasonable expectation that he would be paid, and he should be paid in accord with the benefit received by this estate.

With reference to the opinion of the lower Court that Appellant was a volunteer, attention is invited to the fact that compensation to a volunteer is usually denied only if his acts were officious. In view of the aforesaid facts demonstrating full knowledge, cooperation, encouragement and acceptance of Appellant's services by the Trustee of the Debtor estate, Appellant cannot be accused of officious conduct. Accordingly, reasonable compensation should not be denied on that ground.

C. The Trustee Prevented Any Possibility of Appellant Being Paid by the Buyer.

The evidence in this case is also clear that the Trustee himself conducted the final negotiations for the sale of these assets directly with the Sugarman Lumber Company, the purchaser procured by Appellant,

and the Trustee excluded Appellant from these negotiations. (Tr. 320, 407.) This conduct of the Trustee prevented any possibility that Appellant might have had of being paid by the buyer, or of protecting himself in obtaining compensation from one of the parties to the transaction. It is unusual for a broker to obtain his compensation from the buyer; it is impossible to obtain compensation from the buyer; when the Trustee takes his buyer from him, deals directly with the buyer himself, and excludes the broker from the negotiations. This conduct by the Trustee in effect is a tortious conversion of Appellant's services, and constitutes unlawful dominion by the Trustee over the services furnished by Appellant.

It seems inconceivable that the Trustee under these circumstances should attempt to rely on statements he had made many months before to Appellant that he should obtain his compensation from the buyer when, by his own conduct, he prevented Appellant from participating in the final negotiations for the sale, and made it impossible for Appellant even to attempt to get his compensation from the buyer. In the Nielson transaction, which had been conducted under similar warning, Appellant participated in the negotiations and was able to protect himself in the payment of his commission. Now the Nielson transaction had occurred again. The buyer refused to pay any commission or compensation because that was not the obligation of the buyer.

The Trustee was fully aware of the fact that the Sugarman interests refused to pay the commission,

and the Trustee knew that the exclusion of the broker from these negotiations would certainly prevent and foreclose any possibility the broker might have of being paid by the purchasers. (Tr. 159, 320.) With full knowledge of these facts, and being perfectly free to accept or reject the services of Appellant, the Trustee accepted the purchaser and the benefit of these services. It is submitted that when the Trustee accepts the benefit of the said services by Appellant under these circumstances the law will in good conscience and equity raise an obligation to pay for these services. No one compelled the Trustee to accept the benefit of Appellant's work. Of his own free will the Trustee accepted the benefit of these services rendered at his request, knowing that no provision had been made for the payment of Appellant, and knowing that the buyer had refused to pay any commission. Under these circumstances the Trustee, as a matter of law, accepts the obligation to pay for these services when he accepts their benefits. This is the law of quasi contract, and this is the law applicable to this case. Any statement by the Trustee in regard to the manner of paying Appellant must give way to the conduct of the Trustee in taking Appellant's purchaser and preventing any other manner of payment for the reasonable value of these services requested by the Trustee and freely accepted by the Trustee when they had been rendered.

In summary, the facts of this case show a course of conduct by the Trustee and statements by his agent which led the Appellant on in search for a purchaser

of these assets in the justifiable belief that he would be paid for his work if it was successful. The Trustee had paid his commission for services previously rendered under identical circumstances in the Nielson transaction, and the attorney for the Trustee told him that he would be paid for his services in this sale. When Appellant did procure a purchaser for these assets, the Trustee commenced direct negotiations with this purchaser, and excluded Appellant therefrom thereby preventing any possibility of Appellant obtaining his compensation from any source other than the Trustee.

Appellant contends that upon the facts of this case he is entitled as a matter of justice and equity to reasonable compensation for services rendered in the administration of this estate. The Bankrupt Act, Sections 241-242, authorize the payment of compensation to Appellant for his services in this matter, and the applicable cases authorize the allowance of compensation to a real estate broker under almost identical circumstances. Appellant also contends that both under the law of implied in fact contracts resulting from the conduct of the Trustee, and under the law of quasi contract imposed by the law irrespective of the intent of the parties there is an obligation to pay reasonable compensation for these beneficial services rendered by the Appellant and accepted by the Trustee in this case.

II.

THE ALLOWANCE OF REASONABLE COMPENSATION TO REAL ESTATE BROKERS FOR SERVICES RENDERED IN CONNECTION WITH THE ADMINISTRATION OF AN ESTATE IN REORGANIZATION PROCEEDINGS IS AUTHORIZED BY SECTIONS 241 AND 242 OF THE BANKRUPTCY ACT.

The Bankruptcy Act, Sections 241-250 (11 U.S.C. Sections 641-650) provides for the allowance of reasonable compensation for services rendered in connection with the administration of an estate in reorganization proceedings. Section 242 of the Bankruptcy Act provides as follows:

> "Sec. 242. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—
>
> (1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;
>
> (2) by any other parties in interest except the Securities and Exchange Commission; and
>
> (3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

These Code sections are clear authority for the allowance of the claim of Appellant in this action for his services rendered at the request of the Trustee and his agent, and accepted by the Trustee when a

purchaser was procured by Appellant for the assets of this estate. This sale was admittedly of great benefit to the Bankrupt estate, and it is submitted that Appellant should now be paid reasonable compensation for his services in this reorganization proceeding.

III.

THE ALLOWANCE OF REASONABLE COMPENSATION TO A REAL ESTATE BROKER FOR HIS SERVICES IN THE ADMINISTRATION OF AN ESTATE IN REORGANIZATION PROCEEDINGS WAS AUTHORIZED IN THE BERMAN CASE UNDER ALMOST IDENTICAL CIRCUMSTANCES AND IS AUTHORIZED BY OTHER BANKRUPTCY CASES.

In the case of *Berman v. Palmetto Apartments Corporation,* 153 Fed. (2d) 192 (1946; C.C.A. 6 Michigan) the Circuit Court reversed a District Court which had refused to allow compensation to a real estate broker who had rendered services in a reorganization proceedings to the bankrupt estate in the sale of its assets.

The factual situation in the *Berman* case and in this case are almost identical, and the legal question presented in this matter, and the legal questions before the Court in the *Berman* case, are equally similar.

In the *Berman* case, as in this case, the Debtor corporation was in the midst of reorganization proceedings under Chapter 10 of the Bankruptcy Act, and a Trustee had been appointed. Berman was a licensed real estate broker, and had many conversations with the Trustee in regard to the sale of an

apartment house which was the principal asset of the Debtor corporation. Berman had no written contract with the Trustee, and had not obtained any prior Court authorization for his services. Berman finally obtained an offer from a Mac Hess, a nominee of the final purchaser, which was submitted to the Trustee and accepted. This sale was submitted to the Court for approval. While this sale was under advisement by the Court, the true purchaser submitted an increased offer, which offer was finally confirmed by the Court without mention of a real estate commission to Berman. Berman filed a petition for an allowance of a real estate commission contending, among other things, that he was entitled to compensation for services rendered which benefited the Trustee and the trust estate. The lower Court denied his petition, and the Circuit Court reversed using the following language:

> "The District Court denied his petition altogether. The Court filed an opinion which contained a finding that there was no valid existing contract between Appellant and the Trustee for the payment of a commission to Appellant. Conceivably this may be true because the contract never had the sanction or approval of the Court, but we are not limited to a consideration of the strict legal right of the parties." *O'Hara v. Oakland County,* 6 Cir., 136 Fed. (2d) 142.
>
> "Appellant's case cuts deeper than this. The District Court was sitting in Bankruptcy and under the Bankruptcy Act had equitable jurisdiction. It is generally held that a selling agent is entitled to compensation if his agency is the procuring

cause of the sale, and when his communication with the purchaser have been the means of bringing the purchaser and his principal together, his right to compensation is complete." (Citing many cases.)

"It is unquestionably true that Appellant, on behalf of the Trustees, was actively instrumental in procuring the first offer of the purchaser. It is crystal clear that he was the 'procuring and inducing cause' of the sale. The withdrawal by Mae Hess of the original offer did not nullify his claim for she, as pointed out, was no more than a dummy for the purchasers. Her withdrawal and the second offer of the purchasers amounted simply to a raised bid by the purchasers. The original offer, the withdrawal of it and the subsequent offer, confirmed by the Court, were phases of a continuing transaction which resulted in the sale and in which Appellant certainly had equitable if not legal rights, since at the behest of the Trustee and after diligent effort, he found the purchaser. . . ."

"The District Court was authorized to make an allowance (Title 11 USCA Sections 641 and 642), and we think that the failure to do so was error."

It is this same equitable claim for compensation for services rendered to the bankrupt estate in a reorganization proceedings under Title 11 USCA, Sections 641 and 642, which Appellant now claims in this proceeding.

The *Berman* case is almost on all fours with the case now before this Court, and is abundant authority for the allowance of reasonable compensation to the

Appellant for his services in this matter. It is submitted that among other things, the *Berman* case stands for the following propositions which are applicable in this case.

(1) That the District Court sitting in bankruptcy in a corporate reorganization proceeding has equitable jurisdiction, and is not limited to a consideration of the strict legal rights of the parties involved.

(2) That a real estate broker is entitled to an allowance for the reasonable value of services rendered to the Trustee in a reorganization proceeding where his services have benefited the trust estate.

(3) The Bankruptcy Court is authorized to make an allowance for services rendered by a real estate broker under Sections 241 and 242 of the Bankruptcy Act.

(4) That the Bankruptcy Court is authorized to make an allowance to a real estate broker in a reorganization proceeding where his services have been of benefit to the estate even though the employment of the broker has not had prior authorization by the Court.

(5) That a real estate broker is entitled to compensation if his agency is the procuring cause of the sale, and when his communications with the purchaser has been the means of bringing the purchaser and the principal together, his right to compensation is complete.

In addition to the *Berman* case, Appellant invites the Court's attention to the case *In re Industrial Ma-*

chine & Supply Co. (1953), 112 Fed. Sup. 261, 264, involving a petition for allowance in a reorganization proceeding by a wife who in a most informal manner had assisted her husband in the administration of an estate of which he had been appointed Trustee. Her services had never been authorized by the Court, nor was a definite designation given her by the Trustee as an employee of the Debtor. Nevertheless, the Court did find that direct benefit had accrued to the Debtor from her services and upon that basis reasonable compensation was awarded to her for these services. In this case the Court again recognized the equitable claim of the claimant based upon the benefit that her services had been to the estate, and reasonable compensation was awarded accordingly.

Petitioner also called to the Court's attention the case of *In re Buildings Development Co.,* 98 Fed. (2d) 844, in which the Court in awarding compensation used the following language:

> "The rule which clearly is deducible from the authorities is that where a party designated by the act renders services in connection with the proceedings and plan the Court may not, without some special justification, refuse to allow any compensation whatever. For successful administration of the statute it is as important that committees who have earned something should get some compensation as it is that they should not get too much. *In re A. Herz, Inc.,* this Court remarked 'that the discretion thus lodged by statute in the Court must be exercised with judgment and with the double purpose of doing equity to

those distressed and at the same time rewarding faithful and necessary service with reasonable compensation."

The case of *In re Irving-Austin Building Corporation,* 100 Fed. (2d) 574, was an action for allowance of attorney's fees for services rendered to a bankrupt estate during reorganization proceedings under Chapter 10 of the Bankruptcy Act. The Court in that case states what Appellant feels is the correct rule in awarding allowances in these reorganization proceedings. The Court states as follows:

"Benefit to the estate, and the amount of the benefit, are the criterea by which the value of such services should be measured where no employment by the Court or Trustee exists." (Emphasis added.)

"This conclusion is confirmed by a study of the rulings in the analogous fields of contract law. Liability for debts is traceable to contractual origin. Express or implied promises are prerequisites to debt liabilities. When A contracts with B for the latter's services, a case of express agreement arises. The amount of compensation is fixed by the contract or the law inserts the measure of damages known as quantum meruit. If no contract exists and services are rendered, liability arises only when the results and the benefits of the services are accepted by the other party in which case liability arises out of such acceptance of the fruits of the other's labor. In all such cases liability is measured not by the amount of time and energy expended by the laboring party but by the value of such services to the beneficiary."

The Court in this case makes it clear that an allowance may be made in reorganization proceedings even when there is no contract with the Trustee, and that the true criterea for an allowance in bankruptcy proceedings under these circumstances is benefit to the estate. This rule is in complete accord with contract law which allows recovery in the amount fixed in the contract when agreed upon, in a reasonable amount if no compensation is fixed in the contract, and in the amount of the benefit received when no contract exists at all but the services are rendered and accepted. The latter is a quasi contractual recovery. The Court goes on to state why this rule is applied in reorganization proceedings:

> "This rule not only protects the estate against overcharging for valueless services, but it enables the Court to thoroughly compensate counsel for beneficial services. The protection of counsel who render valuable constructive services is quite as important as protecting the estate against over charges for services which were of no benefit to the estate. And it should be added that Courts must recognize of necessity a vast difference between the value of successful legal services which create a fund to be distributed, and the value of services which are devoted to an equitable distribution of funds in existence when the reorganization proceedings were begun."

The case now before this Court is an excellent example of the necessity of rewarding those who have rendered valuable, constructive services in the administration of the estate. Here Appellant actually created a fund in excess of $4,000,000.00 by the sale of these

assets from which all creditors and stockholders have been paid in full, the Trustee and attorneys have been paid in full, and for which everyone has been paid except the Appellant who created this fund. It is submitted that as a matter of public policy this is the type of services which should be encouraged in these reorganization proceedings, and the type of services for which compensation should be awarded when the services are accepted with such great benefit to the estate. Such a rule of compensation in accord with the benefit received by the estate is completely fair to the creditors and stockholders, and still encourages individuals to render valuable, beneficial services in these reorganization proceedings. Without Appellant's services in this matter the R.F.C. would have foreclosed, and the creditors and stockholders would have received nothing. The value of Appellant's services to the estate and to the stockholders and creditors in this matter is therefore most substantial.

It is apparent that under the applicable statutes and cases Appellant is entitled to reasonable compensation in this matter in accord with the benefit received by the bankrupt estate.

IV.

THE TRUSTEE WAS OBLIGATED TO PAY FOR THE SERVICES OF APPELLANT BOTH UNDER THE LAW OF IMPLIED IN FACT CONTRACTS AND THE LAW OF QUASI CONTRACTS.

The lower Court has found that there was no obligation to pay for the services of Appellant which were

rendered at the request of the Trustee, freely accepted, and of great benefit to the estate. Appellant contends that the circumstances of this case do create an obligation to pay for these services both under the law of implied in fact contract and the law of quasi contract. A statement of the definition of these two types of recovery and of the difference between them is important to the understanding of Appellant's position inthis matter.

Williston on Contracts, Volume 1, Page 6, Section 3:

> "Contracts are express when their terms are stated by the parties. Contracts are often said to be implied when their terms are not so stated. The distinction is not one of legal effect, but in the way in which mutual assent is manifested. The expression 'implied contract' has given rise to great confusion in the law. Until recently the divisions of the law customarily made coincided with the forms of action known to the common law. Consequently, all rights enforced by the contractual action of assumpsit, covenant, and debt were regarded as based on contract. *Some of these rights, however were created not by any promise or mutual assent of the parties, but were imposed by law on the defendant, irrespective of, and sometimes in violation of, his intention.* (Emphasis added.) Such ogligations were called implied contracts. A better name is that now generally in use of 'quasi contracts.' This name is better since it makes clear that the obligations in question are not true contracts, and also because it avoids confusion with another class of obligations which have also been called implied contracts. This latter class consists of obligations

arising from mutual agreements and intent to promise but where the agreement and promise have not been expressed in words. Such transactions are true contracts and have sometimes been called contracts implied in fact."

The distinction between quasi contract and implied in fact contract is also set forth in *Woodward, Law of Quasi Contract* at page 6, Sec. 4, as follows:

"*Quasi contracts distinguished from contracts.*— Only within the last generation have quasi contractual obligations been commonly so called. They were formerly regarded as a species of contract, and *to distinguish them from express contracts and contracts implied in fact* (emphasis added), i.e. contracts in which a promise is inferred from conduct, were called contracts implied in law. Since, like contracts proper, they were enforced by means of the action of assumpsit, it is not surprising that in a period when more importance was attached to the forms of legal remedies than to the nature of substantive rights, the essential dissimilarity of the two obligations was not observed. The persistent failure to recognize it, however, has resulted in confusion and error, and in many cases has wrought serious injustice. It cannot be too strongly emphasized, therefore, that *quasi contracts are in no sense genuine contracts.* The contractor's obligation is one that he has voluntarily assumed. *He is bound because he has made a promise or undertaking that the law will enforce. And the only difference between an express contract and a contract implied in fact is that in the former the promise or undertaking is verbal, while in the latter it is*

> *an implication of the promisor's conduct. But quasi contractual obligations are imposed without reference to the obligor's assent. He is bound, not because he has promised to make restitution—it may be that he has explicitly refused to promise—but because he has received a benefit the retention of which would be inequitable."* (Emphasis added.)

It is apparent that an implied in fact contract is a true contract the evidence of which is supplied by the conduct of the parties, whereas a quasi contract is an obligation imposed by the law without regard to the understanding or assent of the parties, and even in the face of a refusal to pay, as the result of the receipt of a benefit by one party which it would be inequitable for him to retain without compensation.

The law of quasi contract is derived from the common law, and has general application throughout the law. The law of quasi contract is equally applicable in the Federal Court. The distinction between implied in fact contracts and quasi contracts, and the importance of this distinction, has been pointed out in a recent decision of this Circuit Court in the case of *Hill v. Waxburg,* 237 Fed. (2d) 936, 939 (9th Circuit, October 26, 1956) where the Court states as follows:

> "An 'implied in fact' contract is essentially based on the intention of the parties. It arises where the Court finds from the surrounding facts and circumstances that the parties intended to make a contract but failed to articulate their promises and the Court merely implies what it feels the parties really intended. It would follow then that

the general contract theory of compensatory damages should be applied. Thus, if the Court can in fact imply a contract for services, the compensation therefore is measured by the going contract rate.

"*An 'implied in law' contract, on the other hand, is a fiction of the law which is based on the maxim that one who is unjustly enriched at the expense of another is required to make restitution to the other. The intention of the parties have little or no influence on the determination of the proper measure of damages.* (Emphasis added.) In the absence of fraud or other tortious conduct on the part of the person enriched, restitution is properly limited to the value of the benefit which was acquired.

"The distinction is based on sound reason, too, for where a contract is all but articulated, the expectation of the parties are very nearly mutually understood, and the Court has merely to protect those expectations as men in the ordinary course of business affairs would expect them to be protected, whereas in a situation where one has acquired benefits, without fraud and in a non tortious manner, with expectations so totally lacking in such mutuality that no contract in fact can be implied, the party benefited should not be required to reimburse the other party on the basis of such parties' losses and expenditures, but rather on a basis limited to the benefits which the benefited party has actually acquired."

Appellant contends that he is entitled to an award of compensation in this matter under both the law of quasi contract to prevent unjust enrichment and by

the formation of a true implied in fact contract from the conduct of the parties.

A. There Was an Implied in Fact Contract Between Appellant and the Trustee Arising Out of Their Conduct Irrespective of the Statements of the Trustee.

First, from the point of view of implied in fact contract, the lower Court found and the facts disclose that the services of Appellant were rendered with the full knowledge, cooperation and encouragement of the Trustee, and at the request of the Trustee's attorney; were freely accepted by the Trustee, and were of benefit to the estate. These facts create a true implied in fact contract, the existence and terms of which are manifested by the conduct of the parties. When services are rendered at the request of one of the parties, the acceptance of the services is sufficient conduct to establish a true implied in fact contract. The mutual assent and intent to contract is implied from the conduct of the parties in rendering and accepting the services, rather than their words as in express contracts.

However, the lower Court expressed some reluctance to find a true implied in fact contract from the conduct of the Trustee in accepting these services in this case in view of the evidence of statements by the Trustee that Appellant should obtain his compensation from the Buyer. The Court felt that the evidence of these statements prevented the formation of a true implied in fact contract because of lack of mutual assent. However, the Trustee's statements are in

reality only evidence in conflict with the conduct of the Trustee in accepting these services. Appellant contends that the conduct of the Trustee in accepting the benefit of these services under the facts of this case speak more loudly, and are stronger evidence of his true intent, than any words he may have used. These services were offered by the Appellant with the expectation of compensation, and the Trustee had a full opportunity to reject these services if he did not desire to pay for them. The acceptance of these services and the exercise of dominion over them under these circumstances creates a true implied in fact contract. (See Restatement of Contracts, Section 72, Acceptance By Silence or Exercise of Dominion.)

We have here a conflict in the evidence between the conduct of the Trustee and his words, and Appellant feels that this conflict must be resolved by finding that the conduct of the Trustee in accepting these services created a true implied in fact contract. If "A" picks up an apple from "B's" fruit stand on which there is a sign "5c each", and starts eating it, he has either made a contract to pay for it by his conduct or tortiously converted the property of another. If "A" under the same circumstances picks up the apple, but while he is eating it continually shouts at the top of his voice that he does not intend to pay for it, "A" has not prevented the creation of a contract by his spoken words nor has he eliminated the effect of his unlawful dominion over the property of another. The contract is made, and an obligation to pay for the apple arises from "A's" conduct in

eating the apple, and the contract comes into existence by his conduct irrespective of his words and "B" may waive the tort and sue in contract. The same type of conduct in this case, in spite of the Trustee's statement, has created a true implied in fact contract. As is stated in the Restatement of Contracts, Section 72 (1), the acceptance of the benefit with a reasonable opportunity to reject them will create a true implied in fact contract.

Appellant's services were rendered with the expectation of compensation. This expectation of compensation was reasonably predicated upon the fact that under precisely the same circumstances Appellant was paid compensation for similar services rendered to the Trustee in the Nielson transaction. The Trustee freely accepted these services knowing that the buyer refused to pay for them, and that no arrangement for compensation by the buyer had been made since he foreclosed Appellant from participating in the final negotiations. The only logical inference that can be drawn from this conduct by the Trustee is that he intended to pay for these services himself. His conduct could not mean anything else. He and/or his agent had requested services that had to be paid for, and no one else would pay. The acceptance of these services under these circumstances created a contract to pay for them manifested by the conduct of the parties.

This legal principle of assumption of obligation by the acceptance of benefit has been codified in the State of California:

California Civil Code Section 1589:

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

In the recent case of *Desney v. Wilder,* 46 Cal. (2d) 715, 299 Pac. (2d) 257 (June, 1956) the Supreme Court of California set forth a clear and lengthy analysis of the law of implied in fact and implied in law or quasi contract and recognizes both doctrines as being fully applicable in California. The decision further substantiates that there are genuine implied in fact contracts of both the meeting-of-the-mind and the no-meeting-of-the-mind variety, and the Court quotes from an article by Mr. Williston in 14 Illinois Law Review, 85, 90 as follows:

"The parties may be bound by the terms of an offer even though the offeree expressly indicated dissent, *provided his action could only lawfully mean assent.* (Emphasis added.) A buyer who goes into a shop and asks and is given (told) the price of an article, cannot take it and say 'I decline to pay the price you ask, but will take it at its fair value.' He will be liable, if the seller elects to hold him so liable, not simply as a converter for the fair value of the property, but as a buyer for the stated price." (Citing cases.)

B. The Law of Quasi Contract Imposes by Law an Obligation to Pay for Services Which Are Freely Accepted and Beneficial Irrespective of the Intent or Statement of the Parties.

In the absence of a true implied in fact contract, and in the face of the Trustee's statement that he would not pay Appellant, there is still an obligation imposed by law upon the Trustee to pay reasonable compensation for Appellant's services in this matter which were accepted by the Trustee and beneficial to the estate. The Court in its Memorandum and Order of January 26, 1955, stated that it could not torture an agreement out of the facts in this case; and that although equity could enforce an express or implied contract, equity could not make the contract where there was in fact no understanding upon which it could be founded. (Tr. 54 and 55.) Attention is invited to the law of quasi contract wherein a quasi contractual obligation is imposed by law and equity irrespective of the understanding or mutual assent of the parties, and even in the face of an expressed refusal to pay, when in equity and justice there is an obligation to pay. In this exact situation where there has been an acceptance of the benefit of services under ambiguous circumstances, or where there has been no agreement for compensation, the Courts have for many years implied by law an obligation to pay for the services thus accepted, and this obligation is imposed by the law without regard to the existence of a true contract.

The law of quasi contract raises by law an obligation to pay the reasonable value of services rendered

irrespective of the intentions or agreements of the parties.

27 *Cal. Jur.* p. 198, Section 2:

"*A contract implied by law, on the other hand, is not a contract at all, but a quasi or constructive contract, an obligation imposed by law regardless of any agreement.* (Emphasis added.) Actions on quantum meruit to recover the reasonable value of services rendered are based on such a quasi contractual obligation, the fundamental principle involved being that no person can conscientiously retain the benefit of anothers labor without paying a reasonable compensation therefor."

27 *Cal. Jur.* p. 199, Section 4:

"As a general rule, where one performs valuable services for another, the law raises an implied promise to pay a reasonable compensation therefor, unless they are performed under circumstances which show that they were to be gratuitous."

This obligation imposed by the law will prevail against the intent of defendant not to pay, or statements that he will not pay for the services.

5 *Cal. Jur.* (2d) 528, Section 4:

"The implied contract may arise from the conduct of the parties, as where goods are sold and delivered by one person to another at the latter's request. Although there may be no agreement as to payment, the law will raise a contract implied in fact to pay the reasonable value of such goods. *The contract so implied will prevail against the*

actual intent of a defendant not to pay." (Emphasis added.)

7 *Corpus Juris Secundum,* p. 111, Section 4:

"While originally the action of assumpsit was limited in its scope to true contracts, a true contract, in the sense that the parties have entered into an actual agreement, is not now considered essential, as the courts have extended the remedy to include cases where the obligation arises not out of contract, but from the application of equitable principles to the circumstances. *In such a case, the obligation and the fictitious promise out of which it, in theory, springs are imposed by law without reference to the intention of the parties and often against their expressed intentions, for the purpose of allowing the remedy by action of assumpsit.*" (Emphasis added.)

The law of quasi contract is more fully explained in the following quotation:

12 *Am. Jur.* pp. 502-503, Section 6:

"Both express contracts and contracts implied in fact are based on consent. Evidently, in view of the fact that these are the contracts which are usually before the Courts, it has been said that there is no contract without the consent of the parties. Clearly, such an observation must have been made without regard to the existence of certain legal duties which, though of a contractual nature, are not based on consent. These are sometimes spoken of as contracts implied in law, but are more properly called quasi contracts or constructive contracts. They are contracts in the sense that they are remediable by the contractual

remedy of assumpsit. In the case of such contracts, the promise is purely fictitious and is implied in order to fit the actual cause of action to the remedy. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. *The intention of the parties in such case is entirely disregarded while in the case of express contracts and contracts implied in fact the intention is of the essence of the transaction. As has been well said, in the case of actual contracts the agreement defines the duty, while in the case of quasi contracts the duty defines the contract. A quasi contract has no reference to the intention or expression of the parties.* (Emphasis added.) The obligation is imposed despite, and frequently in frustration of their intention. For a quasi contract neither promise nor privity, real or imagined, is necessary. In quasi contracts the obligation arises, not from consent of the parties, as in the case of contracts express or implied in fact, but from the law of natural immutable justice and equity. The act, or acts from which the law implies the contract must, however, be voluntary. Where a case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation."

The law of quasi contract is based upon equitable principles.

12 *Cal. Jur.* (2d) p. 191:

"It is apparent from these examples that such an obligation, although contractual in the sense that it is remediable in assumpsit, lacks the element

of consent, which is an essential ingredient of an actual contract. The law imposes the obligation irrespective of the intention of the parties. *In other words, a quasi contractual obligation arises without reference to assent. It is elementary that such an implied contract has its foundation in the doctrine of unjust enrichment.* (Emphasis added.) It has been stated otherwise that the only promise implied by law is a promise based upon the equitable doctrine that the promisor, having received the benefit, should pay its reasonable value. The action in such cases is in form ex-contractu; but the alleged contract is purely fictitious, the right to recover does not depend on any principle of privity of contract, and no privity is necessary. Although the action is at law, the right to recover is governed by principles of equity."

5 *Cal. Jur.* (2d) p. 526:

"The extensive use of action (Assumpsit) to recover on quasi contracts, where in fact no contract exists other than that created by the fiction of the law to prevent unjust enrichment is based on equitable principles, and both the plaintiff's recovery and the defenses against his claim are governed by equitable considerations."

It is apparent from these citations that in the absence of an agreement or understanding between the parties, and even in the face of expressed intention of one of the parties not to pay, the law does impose an obligation in quasi contract to pay for services rendered at the request of one party accepted by him, and of benefit to him. This obligation is imposed by

he law to do justice and equity between the parties nd to avoid unjust enrichment and is not affected y the absence of agreement or understanding between he parties.

There are obviously a great number of cases dealing vith the law of quasi contracts and its application. t is not necessary to review all of these cases. The eneral rule of these cases is shown by the text citaions hereinabove set forth.

It should be noted that the law of quasi contract s a rule of the common law based on the common law ctions of assumpsit and indebittatus assumpsit. The ommon law is of course applicable in both State and ederal Courts. (*Hill v. Waxburg,* supra, 237 Fed. 2d) 936.)

The following propositions illustrate the application f the law of quasi contract to the facts of this case, nd the following propositions are supported by the ases cited.

. *In the complete absence of any understanding or intent to contract, and even in the face of an express refusal to pay, there is a quasi contractual obligation to pay for services which have been accepted and acquiesced in.*

Vangel v. Vangel, 45 AC 828, 291 Pac. (2d) 25.

This case involves a dissolution of a partnership nd defendants claim for the reasonable value of servces rendered to the partnership after the dissolution. here was no evidence of any request for these serv-

ices, or any evidence of any agreement to pay for them. In fact, the lower Court had found that defendant was a volunteer who had rendered services against the wishes and directions of the plaintiff. However, the Supreme Court held in this case that the mere acceptance of the services, without any request or without any agreement or understanding in regard to compensation, was sufficient to support a recovery by defendant for his services, and that it would be inequitable to deny defendant compensation for his services when his brother acquiesced in them. This is a clear quasi contractual recovery awarding compensation for services rendered and accepted without any evidence of request and without any evidence of mutual consent or understanding in regard to payment.

To the same effect is the case of *Philpott v. Superior Court,* 1 Cal. (2d) 512, 36 Pac. (2d) 635, which contains a lengthy and comprehensive treatment of the development of the law of quasi contract as well as an analysis of its application. This discussion makes it clear that the law of quasi contract is a legal fiction based upon equitable principles of justice and fairness. Because it is a legal fiction imposed irrespective of the intent of the parties, even an expressed refusal to pay cannot affect this obligation created by the law. The Court in this case stated as follows:

> "This doctrine is also expressly endorsed in *Hallidie v. Enginger,* supra, 175 Cal. at page 508 166 P. (2d) 1: 'In some instances the action on implied contracts does not in truth rest upon con-

tracts at all. In others the contract may lie at the base of the wrong or may have enabled the perpetrator to have accomplished his wrong. *Thus, where A delivers goods to B at B's request, even though B never meant to pay for them, the law erects the legal fiction that he promised to pay,* (emphasis added) and he will not be heard to deny it in the action for quantum valebaut in assumpsit'."

These cases illustrate that evidence of statements by the Trustee that he would not pay a commission to Appellant has absolutely no effect upon a quasi contractual recovery. The promise to pay is a legal action raised by the law in the interest of justice and equity from the acceptance of the benefits, and statements by the Trustee refusing to pay have no effect upon this law imposed obligation.

3. *Services rendered in procuring a purchaser for assets of the seller will give rise to a contractual obligation to pay for such services when accepted.*

Freeman v. Jergins, 125 Cal. App. (2d) 536, 271 Pac. (2d) 210.

In this case defendant accepted plaintiff's services in procuring a purchaser for certain stock belonging to defendant. There was no evidence of any agreement or understanding between the plaintiff and defendant in regard to these services or the payment for them. In fact, all evidence of any agreement or understanding between these parties has been stricken from the record because of the death of defendant Cotton. The

Court, found, however, that these services had been rendered by plaintiff with the expectation of compensation, that defendant accepted and had the benefit of plaintiff's services, and that the recipient thereby had an obligation to pay the reasonable value thereof. This case makes it clear that Appellant is entitled to a quasi contractual recovery of the reasonable value of his services in procuring the purchaser for the assets of this estate. This type of service in procuring a purchaser for assets is a proper basis for quasi contract where the services are accepted, and the acceptance of these services will give rise to this obligation even in the absence of any agreement or understanding between the parties.

C. *Where the recipient has intentionally or unintentionally misled plaintiff in inducing him to render services, plaintiff will be entitled to the reasonable value of his services in quasi contract.*

Lazzarevich v. Lazzarevich, 88 Cal. App. (2d) 708, 200 Pac. (2d) 49.

The Court in this case applied the law of quasi contract to support a recovery by plaintiff of the reasonable value of her services during an invalid marriage which she believed in good faith to be valid. This mistaken belief was caused by defendant's representations, and this mistaken belief induced plaintiff to render these services. The Court held that plaintiff was entitled to compensation for the services that had been rendered under this mistaken belief, and held that this quasi contractual recovery would be allowed

whether the misrepresentations were fraudulently or innocently made. (See also *Restatement of Restitution,* Section 40). These citations illustrate that the intentional or unintentional misleading of Appellant by the Trustee's conduct in the Nielson transaction, and the statements of Mr. Carr that he would be paid, are an additional ground for the application of quasi contractual recovery.

). *Quasi contractual recovery is given in Reorganization proceedings under the Bankruptcy act to compensate petitioners who have rendered services which were accepted and of benefit to the Debtor estate.*

In re Irving-Augustin Building Corporation, (supra), 100 Fed. (2d) 554.

This was an action for an allowance for services rendered to a bankrupt estate during reorganization proceedings under Chapter 10 of the Bankruptcy Act. The Court in that case states what Appellant feels is the correct rule in awarding allowances in these reorganization proceedings. The Court stated as follows:

"Benefit to the estate, and the amount of the benefit, are the criteria by which the value of such services should be measured where no employment by the Court or Trustee exists."

"This conclusion is confirmed by a study of the rulings in the analogous fields of contract law. Liability for debts is traceable to contractual origin. Express or implied promises are prerequisite to debt liabilities. When A contracts with B for the latter's services, a case of express

> agreement arises. The amount of compensation is fixed by the contract or the law inserts the measure of damages known as quantum meruit *If no contract exists, and services are rendered liability arises only when the results and the benefits of the services are accepted by the other party in which case liability arises out of such acceptance of the fruits of the other's labor* (Emphasis added.) In all such cases liability is measured not by the amount of time and energy expended by the laboring party, but by the value of such services to the beneficiary."

This bankruptcy case is clear authority for quasi contractual recovery in bankruptcy proceedings. To the same effect are the cases of *In re Buildings Development Co.,* 98 Fed. (2d) 844; and *In re Industrial Machine & Supply Co.* (supra), 112 Fed. Sup. 261 264.

The case of *Berman v. Palmetto Apartment Corp* (supra), 153 Fed. (2d) 192, which has already been discussed in this brief, is another case where the Court awarded compensation to a real estate agent for services rendered based upon benefit to the estate and in the interests of justice and equity and even in the absence of any contract or legal claim. The *Berman* case is also apparently a case of quasi contractual recovery.

V.

RIOR AUTHORIZATION IS NOT REQUIRED IN BANKRUPTCY PROCEEDINGS WHERE COMPENSATION IS BASED ON BENEFIT TO THE ESTATE.

It appears from the cases that reasonable compen-ation has often been allowed by the Court in bank-uptcy proceedings for services rendered to the Debtor state which are beneficial to the estate without prior uthorization for these services having been obtained rom the Court. In this situation the compensation as been in accord with the benefit received.

This is to be distinguished from the situation where claim is made against the estate based upon an ex-ress contract fixing a definite contract price, in which tuation the Courts may require prior authorization r such an express contract in order to protect the state from any excessive charge which may be fixed the contract. However, that is not this case.

Here Appellant seeks compensation for services neficial to the estate, and in accord with the benefit hich was received by the estate. Here the measure compensation is the value of the benefit to the state. As the Court stated in the case of *In re Irv-g-Austin Building Corp.* (supra), 100 Fed. (2d) 574, benefit to the estate, and the amount of the benefit, e the criteria by which the value of such services ould be measured, where no employment by the ourt of Trustee exists." This rule of allowing com-ensation in accord with the benefit received by the tate when no prior authorization has been obtained,

allows the Court to reward those who have rendered services beneficial to the estate, and also protects the estate against charges for valueless services from which the estate derives no benefit.

This same principle of awarding compensation in accord with benefit to the estate even when there has been no contract for the services and when the services have not been previously authorized by the Court has been followed in the case of *Berman v. Palmetto Apartment Corp.* (supra), 153 Fed. (2d) 192; in the case of *In re Building Development Co.* (supra), 9[illegible] Fed. (2d) 844; in the case of *In re Industrial Machine & Supply Co.* (supra), 112 Fed. Sup. 261, 264; and in the case of *In re Equitable Office Building Co.,* 8[illegible] Fed. Sup. 531. In fact, Appellant was awarded a commission of 5% of the sales price of certain cutting contracts in this very proceeding in the Nielson transaction without any prior authorization for his services from the Court.

The services of real estate brokers and other agents are essential to the successful administration of a bankrupt estate. In order to obtain these essential services there must be some basis for compensation. In this case, as in many cases, it was impossible to determine prior to the rendition of the services which of the many real estate brokers encouraged by the Trustee to participate in the sale of the assets of Debtor estate would be successful in obtaining a purchaser for the said assets, and it was therefore impos

ible to obtain prior Court approval for the said serv-
ces.

It is submitted that awarding compensation in ac-
ord with the contract price when the contract has re-
eived prior approval of the Court, and compensation
n accord with benefit to the estate pursuant to the
ule in the above cited cases when there has been no
rior approval for the services is a solution to this
roblem. Such a rule is fair to the Debtor estate
hich has received the benefit, and still provides a
asis for compensating those whose services are essen-
al to the successful administration of a bankrupt
state.

Without such a rule of compensation this estate and
hers would end in a foreclosure by secured creditors;
hereas a rule of compensation for successful services
accord with benefit to the estate as set forth in the
ases above cited is a basis for obtaining participation
specialists in these bankruptcy proceedings.

CONCLUSION.

In conclusion it is submitted that as a matter of
w, and/or equity, to prevent unjust enrichment and
harsh result in this case, and as a matter of sound
blic policy, Appellant should be reasonably compen-
ted for loyal, unofficious, meritorious and highly
neficial services rendered to the Debtor estate on

any one or all of the legal concepts set forth hereinabove in detail.

Dated, September 20, 1957.

Respectfully submitted,

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